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IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

No. 517.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY and TEXARKANA AND FORT SMITH RAILWAY COMPANY,

Appellants,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Appellees.

APPEAL FROM UNITED STATES DISTRICT COURT FOR THE WESTERN DIVISION OF THE WESTERN DISTRICT OF MISSOURI.

BRIEF FOR APPELLANTS.

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DIVISION OF THE WESTERN DISTRICT OF MISSOURI.

BRIEF FOR APPELLANTS.

Statement.

Opinion of the lower court and the commission's report and orders.

The opinion of the lower court, which has not been officially reported, will be found in the record (R. 140). The report of the Commission (155 I. C. C. 775), which preceded the two orders in question, will be found in the record (R. 101). The two orders (R. 11, 13) are copied

in this brief as Exhibits A and B. Probable jurisdiction of this appeal was noted November 24, 1930.

The commission's orders, and the particular part thereof which is challenged in this action.

The Commission (three members dissenting), on November 4, 1929, and July 30, 1929, respectively (Exhibits A and B), entered two orders. As they deal with the same subject-matter and might have been embraced in one order, they will be collectively referred to herein as "the order". The first order, after making certain findings which will be referred to hereafter, required the appellants, who will be herein referred to as "the plaintiffs", and other carriers to "cease and desist . . . from the transportation or movement of private passenger-train cars, including so-called office cars, of another carrier free or at other than published tariff rates." No restriction was imposed upon the transportation or movement by a carrier of its own office cars upon its own line. The second order amended the Commission's pass regulations to conform to the foregoing requirement.

It will be noted that the Commission's order, evidently through inadvertence, is made by its terms to apply to intrastate movements, as well as interstate movements.

The plaintiffs do not seek to set aside the order in its entirety. They challenge it so far as it prohibits the movement of an office car of another carrier upon such terms as the interested parties may mutually agree upon, when such office car is occupied exclusively by officers and employees of the company owning the car and traveling upon business in connection with the operation of their own railroad. Whenever the words "office car" occur in this

brief, they mean an office car so occupied and so used. They also seek to challenge so much of the order as purports to regulate movements which are strictly intrastate. They do not seek to modify or disturb the order in any other respect.

Grounds upon which the challenged part of the order is alleged to be invalid.

Plaintiffs contended in the lower court (R. 1) and now contend here, that neither they nor any of the other carriers of the country have ever held themselves out, by published tariffs or otherwise, as common carriers of office cars, and that they have never handled office cars in the capacity of common carriers; that plaintiffs and other carriers own valuable office cars which for many years have been in daily use upon their own lines, and in occasional use upon foreign lines; that such office cars, so used, are necessary facilities in the operation of their railroads and in the transaction of their usual and customary business; that such office cars, when moved over the line of another carrier, are moved in each individual instance upon the special request of the company desiring the movement, which request such foreign line is at liberty to grant or refuse, and does grant or refuse, in its discretion; that the use of such office cars on foreign lines is not a matter in which the public is interested, or in which a public service is involved; that such movements of office cars are made by such foreign lines in their capacity as private carriers, and not in their capacity as common carriers, and, for that reason, the Commission is vested with no power or authority to regulate their movements or the terms on which such movements are made; that the interested companies have the constitutional right to use such office cars on foreign lines, when such

foreign lines consent thereto, and full liberty to contract with them with respect to the terms of such movements; and that this right to make lawful use of their property, and to enter into lawful contracts in reference thereto, cannot be abrogated by the Commission, as it has sought by its order to do.

Plaintiffs also contend that the movement of such office cars over foreign lines does not discriminate against any member of the traveling or shipping public, and that there was no evidence before the Commission to justify its finding that such discrimination exists.

Plaintiffs further contend that the provisions of the Interstate Commerce Act relating to free transportation, and the administrative rulings made by the Commission in reference thereto, together with the subsequent action and non action of Congress in reference thereto, duly authorized and legalized the free movement of office cars over foreign lines. This contention will not be argued at length in this brief, since it is involved and will be dealt with in the brief of appellants in the companion case, *Louisville & Nashville R. R. Co., et. al. v. United States and Interstate Commerce Commission*, No. 333.

These contentions were denied in the lower court, and plaintiffs insist that the lower court erred in so ruling.

Plaintiffs ask leave in this Court to amend their assignments of error so as to challenge so much of the order as purports to regulate the movements of office cars which are strictly intrastate.

Proceedings before the Commission.

The Commission, as stated by it (155 I. C. C. 775) (R. 101), instituted upon its own motion an investigation "con-

cerning the use of private passenger-train cars, including so-called office cars, in the transportation of persons." This investigation took the form of a questionnaire, which was sent out to all Class I and II carriers and to switching and terminal carriers, calling for information as to private passenger train cars owned, leased, or operated, the movement or use of such cars as were transported free or at less than tariff rates on home and foreign lines, and the occupants of such cars on respective trips. Returns were filed, under oath, by 387 carriers, covering the calendar years 1923, 1924, and 1925. The information thus secured was classified and tabulated and made the basis of the Commission's report and order.

It will be noted from an examination of the Commission's report, as a whole, that it contains no criticism whatsoever of the uniform and long continued practice of transporting office cars, we have defined them. Indeed, the Commission takes pains to approve the use of such office cars and to declare them to be "an important facility for carrying on the business of the road." It said (R. 108):

> The private cars of railroad officials are intended to be offices on wheels for those whose duties require considerable travel over the line and when used for that purpose are an important facility for carrying on the business of the road.

The Commission further points out, in line with our own contention, that it is seldom that movements of office cars over other lines is necessary, but that when such movements are necessary, they may be justified for business reasons. It adds to the statement last above quoted:

> It is seldom, however, that these duties necessitate a movement of the car over other lines. In

> some cases such a movement may be justified for business reasons; for example, where it avoids a very circuitous haul over the home line.

The Commission, in this last quotation, was speaking of the free movement of office cars over foreign lines. It does not say that such movements should be prohibited, or that they should be made only at tariff rates. It concedes that such movements may properly be made, provided only they are limited to such as are necessary and justified by business reasons. The Commission truly says that such movements are not the rule, but the exception, and that they occur only seldom or occasionally. It seems reasonable to assume that the Commission would have excepted office car movements from the scope of its order except for the fact that it reached certain legal conclusions in reference thereto, which we regard as erroneous. They are referred to below.

The Commission's report is devoted, almost entirely, to a consideration and condemnation of the use of private cars for other than legitimate purposes; that is, to their use by others than officers and employees of the carriers. This is shown by the Commission's statement (R. 102):

> The returns to the questionnaire show that the occupants of private cars are not restricted to officials and employees of the carriers but include in a large number of cases the families, relatives, and friends of railway officials traveling on passes or on tickets that would in most cases entitle them only to transportation in the ordinary coach.

Then follow illustrations of extensive movements of private cars by others than officers and employees (R. 103). It is said (R. 104) that there is a substantial use of private cars, both on home and foreign lines, by directors of car-

riers, and a substantial use of private cars for trips to Florida and other resorts. Reference is made (R. 105) to an extensive use of private cars by short lines, industrial roads, and lines owned, controlled, or used in the interest of some particular business. Attention is called (R. 107) to numerous instances where private cars were dead-headed to and from off-line shops without charge.

Then follows the statement above quoted, approving the use of office cars as an important facility for carrying on the business of the road, and justifying their occasional use on foreign lines; and, immediately after that statement, the Commission gives its conclusions, which evidently formed the basis of its order, as follows (R. 108):

> . . . But the returns to our questionnaire indicate that private cars are often used for other than business purposes by railroad officers, their relatives, and friends. Moreover, they appear to be used in some instances for the benefit of an industry which controls the railroad. In other instances, their use in entertaining shippers may be for the purpose of obtaining business for the railroad. These and other abuses are apparent from the returns, but we are here concerned primarily with the legality of the free transportation of private cars of other carriers. We will, therefore, proceed to a consideration of the law applicable to the subject.

It may be fairly said that the entire report deals with what the Commission regards as the abuses that have grown up in the movement of private cars, and that its order was intended to put an end to these practices. Not only was there no criticism of the proper use of office cars, but the Commission, as above stated, specifically approved the use of the office car on home lines and its occasional

use on foreign lines when necessary and justified by business considerations.

The Commission's view of the law applicable to the transportation of office cars, which, doubtless, caused it to include office cars within the scope of its order, will be dealt with in the brief. For present purposes, it will be sufficient to say that it reached the conclusion (R. 109) that "a passenger-train car is property"; and that one carrier can not lawfully transport the property of another carrier without exacting compensation therefor at published tariff rates. This view, as applied to the movement of an office car, is necessarily predicated upon the assumption that such office car is being transported by the common carrier in the performance of its public duties as a common carrier. We shall point out later our reasons for our belief that this assumption is entirely erroneous.

The Commission also found that it was unjustly discriminatory, unduly preferential and prejudicial to haul the private cars of other carriers free or at less than published tariff rates, while making a charge of 25 fares for the movement of special, privately owned, or chartered cars, which move at published tariff rates. We contend in the brief that there was no evidence to support a finding of discrimination in the movement of office cars; and further that there can be no discrimination against members of the shipping or traveling public in the free movement of office cars, in which the shipping or traveling public have no interest, and in hauling special, privately owned or chartered cars at tariff rates, which are available to the public generally.

The facts disclosed by the record.

We are not advised of any controversy over the facts. They appear in the Commission's report (R. 101) and in the testimony of Mr. Johnston, plaintiffs' president (R. 93-98). We give a brief summary of them, so far as deemed material to a consideration of the issues.

Plaintiffs are the owners of five office cars, of an aggregate value in excess of $200,000.00. These cars are literally "offices on wheels". Each officer to whom an office car is assigned has in the car, when in use, current correspondence, office files, blue prints, map cases, desks, tables, etc.; in fact, he has all the facilities in the car for performing his usual duties that he has in his office at headquarters. There are also eating and sleeping accommodations for the officers and their clerical force. Most of the officers conduct more actual office work while on the road in their cars than they can in their office at headquarters, because they can work there without interruption. One or more of the office cars are in service on the lines of the plaintiffs' railroad almost every day in the year. They are very necessary and play an important part in the operation of the railroad.

It is necessary upon occasion to move the office cars of a railroad, a railroad like that of the plaintiffs, over foreign lines in connection with the business of the company, when the office car is occupied by officers and employees transacting their usual daily business. The necessary movements over foreign lines, however, are only occasional. Judging from the past, a maximum use of the office cars of the plaintiffs on foreign lines would be three times a month. Such movements over foreign lines to this extent would be essential and necessary in the business of the

company. This practice of using office cars on home and foreign lines has existed for a great many years, practically ever since the advent of the steam railroad.

Illustrations of the movements of office cars over foreign lines which are regarded as necessary in transacting the business of the company are given. There are many meetings of railway executives in Chicago, called to discuss rates, labor schedules, and for many other purposes in which all are interested generally, and in which each is interested in behalf of his own line. There are also many similar meetings at St. Louis. These two cities are the headquarters of a considerable number of railroads, and for that reason are more convenient meeting places. Plaintiffs road is the only one having its headquarters in Kansas City, Mo. For attending these meetings an office car is frequently essential in the economy of time. The transaction of an officer's daily duties continues in the office car in the same manner as if he were at home. If, for illustration, the officer is called from Chicago at the end of a conference there to keep an appointment on the line of his railroad at Shreveport, La., he goes there direct from Chicago in his office car, and avoids the loss of time which would be required in returning to Kansas City and then going from there to Shreveport, thus saving a day and also avoiding any interruption in his work. Another illustration of the use of office cars on foreign lines is found in the movement between Kansas City, the operating headquarters of plaintiffs, and New York, where meetings of the board of directors are held, where the chairman of the board resides, and where the president of the plaintiffs, as a director, is required to go occasionally to attend board meetings and to discuss and solve many problems of railway operation. There is also a similar movement from New York to Kansas

City when the chairman of the board and one or more directors make their annual inspection trip over the lines of the plaintiffs. An office car is essential for this purpose, since there must be carried correspondence, office files, blue prints, etc., available for consideration and determination of programs of construction, improvements and operation and generally for the transaction of the business of the year. The officers of a carrier cannot conduct its business in a Pullman berth or in a drawing room with anywhere near the convenience and facility offered by an office car, since there is no room for office files and office equipment.

There are not now, and never have been, any published tariffs covering the movement of office cars, except as such tariffs may have been put in since the effective date of the Commission's order herein in obedience to its command. Office cars have never been moved under published tariffs. The scope and the purpose of the Commission's order herein is to require carriers to publish tariffs covering the movement of office cars or private cars generally, or to abstain from such transportation.

There are published tariffs which provide for the movement of "special, privately owned or chartered cars for the exclusive use of special parties" (R. 113). This is a revenue service available to the public generally, which may be demanded as of right. Any member of the public owning a private car, or having chartered one, may demand, as of right, the transportation of the car under the tariff on payment of the tariff charges. Any carrier refusing to transport the car would be compelled by the courts to render the service. The ordinary charge for the movement of chartered cars of this character is 25 adult fares, with a minimum of 10 adult fares for the movement of the car empty, in charge of porter or other attendants.

The tariff for chartered cars has no application to the movement of office cars. The Commission itself says (R. 114):

> The term privately owned cars is not defined in the tariffs, but its obvious meaning is cars owned by others than the carriers.

The movement by one carrier of the office car of another is always made upon the request in each individual instance of the carrier desiring the movement. This is admitted by the Commission in its answer. If the plaintiffs desire a car moved from Kansas City to Chicago, for illustration, they address the officer of the line over which the movement is desired, saying, in substance: "If entirely consistent, will you kindly arrange movement of car so-and-so between such-and-such points". The request is usually granted, although that is not always the case. The carriers assume no duty to move officer cars for all who apply. The right to grant or refuse the movement is always reserved. Office cars constitute no part of the transporting carrier's passenger equipment and are not available for use by passengers generally.

If office cars can only be moved under the tariff applicable to chartered cars, plaintiffs will be deprived to a certain extent of the use of their office cars. The use of office cars would be very much restricted. Office cars have been moved by the carriers in the past gratuitously, as a matter of reciprocal accommodation.

The Commission points out that freight cars, and to some extent passenger cars, move freely over foreign lines; and it states the terms on which such cars are handled (R. 112, 113). The freight cars in service are generally interchanged between the principal carriers, not under pub-

lished tariffs, but under rules of the American Railway Association. The carrier in possession of the car pays the owning line a certain amount for each day the car is on its line. This is the per diem charge, and is in the nature of rent for the use of the car. It is paid whether the car is loaded or empty. Freight cars in regular service are not subject to transportation charges. The per diem charge above referred to is not a tariff charge, but is an intercompany arrangement, controlled by contract.

The tariffs provide certain charges per car per mile for the transportation of all kinds of railway equipment on their own wheels when they are moved from the place of manufacture to the home line before being placed in service; also on cars moved empty to and from repair shops off the home line, and on any other movements over foreign lines when not in regular service. When a car is being handled for revenue purposes, it is in service, and not subject to tariff or other charges; but when it is transported solely for the benefit of the owning line, the latter must pay for such transportation on another line. The transportation services for which charges are made are covered by published tariffs.

Privately owned freight cars are also used by the carriers in transporting property of the owners. An allowance of so much a mile is paid to the carrier by the owner for the use of the car. This is a matter of agreement between the parties. No tariff or other charge is made for the hauling of a privately owned car in service.

Passenger cars of one carrier are sometimes operated over the line of another carrier in maintaining through service. The terms on which this is done are a matter of contract, not covered by tariff. As in the case of freight cars, no tariff or other charges are assessed for the han-

dling of cars in service; but cars not in service are subject to the charges in the tariff.

These facts make it clear, plaintiffs contend, that railway companies are not common carriers of office cars; that when they transport an office car of another carrier they do so in the capacity of private carrier, with full power to contract in reference thereto; and that in the transportation of an office car free, or on such terms as the interested parties may agree upon, there is no prejudice to a discrimination against any member of the shipping or traveling public.

Proceedings in the lower court.

The case was heard and determined by a statutory court, under the provisions of the Urgent Deficiencies Appropriation Act. The evidence consisted of a certified copy of the questionnaire submitted to a large number of the carriers of the country, and their answers thereto, together with the oral testimony of plaintiffs' president. The court handed down a final decree, dismissing the plaintiffs' petition. Its opinion may be briefly summarized as follows:

Railroad companies hold themselves out as common carriers of "private cars", having established tariffs for the transportation of such cars; that is a part of their common carrier business, and is within the scope of their charter powers. Therefore, office cars are transported by railroad companies in their capacity as common carriers, and not in their capacity as private carriers, and such transportation is governed, not by private contract, but by tariff regulations.

It is not entirely clear how the lower court reached its conclusion that office cars are transported by railroad com-

panies in their capacity as common carriers. Evidently, it assumed that because tariffs are published for "special, privately owned, or chartered cars, for the exclusive use of special parties," it necessarily follows that these tariffs cover the transportation of office cars, although the Commission's specific finding, as well as the statements in defendants' answers, was to the contrary.

The court also held that the movement of an office car free or at less than tariff rates constituted unjust discrimination, the fact that the movement is free being alone sufficient evidence of discrimination. The court further denied plaintiffs' claim that the long-continued and uniform construction by the Commission of the Interstate Commerce Act, recognizing and providing a form for "car and party" passes for the movement of office cars over foreign lines, together with the action and non-action of Congress in reference thereto, had legalized such movements.

We believe that the lower court's determination of the issues was erroneous, and we have set forth in our brief the reasons for so believing.

Specification of errors.

1. The lower court erred in holding that the movement, over a foreign line, of an office car occupied by the officers and employees of the line owning the car, holding free transportation over such foreign line and traveling in the interest of, and in connection with the operation of their road, constitutes a common carrier service, for which the Commission may require or prescribe published tariffs, notwithstanding the conceded fact that the carriers of the country have never held themselves out by published tariffs, or otherwise, as common carriers of office cars so occu-

pied and used, and that movements of such office cars over foreign lines have always been made upon the special request, in each individual instance, of the line owning the car and desiring the movement, which request the foreign line is accustomed to grant or refuse in its discretion.

2. The lower court erred in holding that, because the railway companies of the country had published tariffs requiring a minimum number of tickets for the transportation of chartered or privately owned cars when used by the traveling public generally, such companies thereby became common carriers of office cars of other companies moving over their lines, even when such office cars were occupied by the officers and employees of the company owning the car, traveling on free transportation in the interest of and in connection with the operation of their own road, where such railway companies have never held themselves out by published tariffs or otherwise, as common carriers of office cars so occupied and used.

3. The lower court erred in refusing to hold that the movement over foreign lines of office cars, occupied and used as above stated, is a valuable railroad facility, essential to successful and economical operation, and as such is strictly an inter-company matter in which the public is not concerned, and over which the Commission has not been vested with power or jurisdiction.

4. The lower court erred in holding that there was any substantial evidence in the record to support the Commission's finding of undue preference or prejudice, or unjust discrimination, in the movement of office cars over foreign lines, when occupied and used as above stated, upon such terms as the interested parties may agree upon.

5. The lower court erred in holding that the free movement of an office car, occupied and used as above stated, is in itself sufficient evidence of discrimination.

6. The lower court erred in failing to hold the Commission's said orders void, in part, for the reason that the free transportation of an office car of one carrier by railroad by another carrier by railroad, where occupied and used as above set forth, is authorized by the provisions of the Interstate Commerce Act, and particularly Sections 1 and 22 thereof, and by the interpretations of such Act by the Interstate Commerce Commission and by the adoption of such interpretation by the Congress of the United States.

7. The lower court erred in entering the decree herein refusing to grant the relief prayed by plaintiffs in their petition in the above-entitled cause, and in dismissing said petition.

Request for leave to amend plaintiffs' assignment and specification of errors, or, in the alternative, that the Court notice a plain error not assigned or specified.

For reasons hereafter stated, the plaintiffs ask leave of the Court to amend their assignment and specification of errors by inserting an additional assignment or specification; or, in the alternative, they ask the Court to notice, as a plain error, the error so sought to be assigned and specified, which is as follows:

8. The lower court erred in not holding that the Commission's order, in so far as it purports to affect, control, or regulate strictly intrastate movements of office cars, is invalid because it is in violation of Sec. 1 (2) (a) of the Interstate Commerce Act, and also because it is in excess

of the powers conferred on the Federal government by the commerce clause of the Constitution (Art. I, Sec. 8).

ARGUMENT.

I.

A railway company, in the transportation or movement of an office car of another carrier acts in the capacity of a private carrier, or bailee, and retains full freedom of contract in reference thereto: and for that reason is not subject to the Commission's order challenged in this proceeding.

It will be seen from the preceding statement and from the summary of the decision of the lower court that the important question in this case is whether a common carrier, transporting the office car of another carrier, acts as a private carrier or as a common carrier; if the former, the right of contract as to the terms of the transportation exists.

For the purpose of our discussion under this heading, we accept the statement of the Commission that there are no tariffs covering the movements of office cars owned by carriers. Later, under a separate heading, we shall deal with the subject of tariffs and the lower court's apparent confusion in reference thereto.

It is true that the plaintiffs and other railway companies who have occasion to move the office cars of another carrier are ordinarily organized as common carriers, with corporate authority to act as common carriers for hire of both freight and passengers; but the fact that they are so organized, with broad charter powers, is of no legal

significance in determining the capacity in which they act in a particular instance. It has been authoritatively established that this question is not determined by charter powers, upon which the lower court laid considerable stress and which, no doubt, was the basis, in part at least, of its decision, but by the nature of the service performed in the particular case (*Terminal Taxicab Co.* v. *Kutz*, 241 U. S. 252; *United States* v. *Brooklyn Terminal*, 249 U. S. 296, 304; *Pacific Spruce Corp.* v. *McCoy*, 294 Fed. 411, 414; *State* v. *Public Service Comm.*, 275 Mo. 483, 493). The solution of our problem must be found, therefore, not in charter provisions, as the lower court seemed to suppose, but by a consideration of the nature of the service performed in the transportation of office cars.

It is to be borne in mind that the Interstate Commerce Act limits and restricts the Commission's power of regulation to those activities of railway companies which fall within the scope of their common carrier duties. Congress, in Section 1, paragraph (3), of the Act was careful to say: "Whenever the word 'carrier' is used in this Act it shall be held to mean 'common carrier'."

It is also to be borne in mind that, broad as is the power of regulation, neither the Congress nor the Commission enjoys the freedom of an owner. Railway properties, while subject to reasonable regulation in the public interest, are nevertheless held in private ownership. The management and right to control the business policy of each company belongs to it. Subject to the two leading prohibitions that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate so as to give undue preference or disadvantage to persons or traffic similarly circumstanced, common carriers are left as they were at the common law, free to manage their important interests

upon the same principles which are regarded as sound and adopted in other trades and pursuits (*Banton* v. *Belt Line Ry.*, 268 U. S. 413, 421; *Northern Pacific R. Co.* v. *North Dakota*, 236 U. S. 585; *Interstate Commerce Commission* v. *Chicago Great Western R. Co.*, 209 U. S. 108; *Interstate Commerce Commission* v. *Alabama Midland R. Co.*, 168 U. S. 144).

It is uniformly held that statutes regulating common carriers deal only with their common carrier activities, and do not apply to or control their private carrier activities (*Santa Fe R. Co.* v. *Grant Bros.*, 228 U. S. 177; *Terminal Taxicab Co.* v. *Kutz*, 241 U. S. 252; *Roberts on Federal Liabilities of Carriers* (1929), 2d Ed., Vol. I, at Sec. 310; 10 C. J., Sec. 759; *Sager* v. *Northern Pac. Ry. Co.*, 166 Fed. 526; *Ex Parte Alabama Great Southern R. Co.*, 206 Ala. 400; *Puget Sound Ry. Co.* v. *Kuykendall*, 293 Fed. 791).

It is well known that there are a large number of private carrier activities, including inter-company relations (referred to more at length under a subsequent heading) which do not affect the public with respect to either service or charges, and in which the public, therefore, is not concerned, and over which it can not be claimed that the Commission has the power of regulation.

In the movement of the office car of another carrier, under the circumstances shown in this case, the transporting company, although a common carrier in most of its activities, is, nevertheless, a private carrier. The rule of law that a common carrier, in some particular instances acts in the capacity of a private carrier, free from many of the restrictions resting upon common carriers, has become too firmly established to be questioned now. In fact, the lower court concedes the correctness of this principle when it says (R. 141):

> Undoubtedly it is true that a common carrier also may be in some situations a private carrier. Terminal Taxicab Company *v.* Kutz, 241 U. S. 252; Santa Fe Railway *v.* Grant Bros., 228 U. S. 177; Chenery *v.* Employer's Liability Assur. Corp. (9 C. C. A.), 4 Fed. (2d) 826; Railroad Company *v.* Lockwood, 17 Wall. 357. It is true that notwithstanding the Interstate Commerce Act such a common carrier as a railroad company may in some situation contract to carry both persons and property as a private carrier. Santa Fe Railway *v.* Grant Bros., *supra;* Chenery *v.* Employer's Liability Assur. Corp., *supra.*

We contend that this conceded principle applies to and controls the instant case. It will be helpful, therefore, to examine the decisions of this and other courts to make it plain that the facts in the present case bring it within the rule.

An early statement by this Court of the rule which we invoke is in *New York Central R. Co.* v. *Lockwood,* 17 Wall. 357, 377, where it is said:

> A common carrier may, undoubtedly, become a private carrier, or a bailee for hire, when, as a matter of accommodation or special engagement, he undertakes to carry something which it is not his business to carry. For example, if a carrier of produce, running a truck boat between New York City and Norfolk, should be requested to carry a keg of specie, or a load of expensive furniture, which he could justly refuse to take, such agreement might be made in reference to his taking and carrying the same as the parties chose to make, not involving any stipulation contrary to law or public policy.

This statement of the rule has been adopted without qualification by the courts and text writers alike. We contend that an office car movement is within the rule.

This Court's decision in *Terminal Taxicab Co. v. Kutz*, 241 U. S. 252, applying the same principle, is peculiarly applicable to the facts of this case, and may well be deemed controlling. There, the Taxicab Company, in the District of Columbia, was engaged in the performance of three services: first, in handling persons, by automobiles and taxicabs, to or from trains at the Union Station; secondly, in furnishing enough taxicabs and automobiles to meet the needs of the guests of certain hotels, with which it had an exclusive contract; and, thirdly, in furnishing automobiles from its central garage on orders, generally by telephone.

The Public Utilities Commission ordered the Taxicab Company to furnish it with a schedule showing all the rates and charges in force for any service performed by the Taxicab Company within the district, or any service in connection therewith. This is similar to the Commission's challenged order in this case. The Taxicab Company, asserting that it was only a private carrier, brought an action to restrain the Public Utilities Commission from exercising jurisdiction over it. The question for decision was whether the Taxicab Company, with respect to its activities above stated, was a common carrier, subject to public regulation.

This Court held that the Taxicab Company, with respect to its first two activities, was a common carrier and subject to the jurisdiction of the commission; but it also held that the Taxicab Company was a private carrier, and not a public carrier, in the performance of its other activities; and, hence, that the commission had no authority over that part of its business, and that it was not required to file its tariffs. The reasons assigned by the Court for holding that the company's garage business was not conducted as a common carrier, but as a private carrier, are of importance, since they are peculiarly applicable to the service

performed by the railway company in handling the office car of another carrier. The Court said (p. 255):

> The rest of the plaintiff's business, amounting to four tenths, consists mainly in furnishing automobiles from its central garage on orders, generally by telephone. It asserts the right to refuse the service, and no doubt would do so if the pay was uncertain, but it advertises extensively, and, we must assume, generally accepts any seemingly solvent customer. Still, the bargains are individual, and however much they may tend towards uniformity in price, probably have not quite the mechanical fixity of charges that attend the use of taxicabs from the station and hotels. There is no contract with a third person to serve the public generally.

The facts in the above-quoted statement are more persuasive evidence of a public employment than are the facts in the case under consideration. There, the Taxicab Company advertised extensively, thereby inviting the public to avail itself of the services offered. This, of course, is not the case in the handling of office cars.

The controlling fact in the mind of the Court, which led to the conclusion that the garage service was a private carrier service, appeared to be that "the bargains are individual", and the asserted "right to refuse the service". In other words, there was no holding out to the public of a readiness to serve all on terms of equality. The services offered were not such as any members of the public could demand as a matter of right, and for that reason there were individual bargains in each particular case. The same considerations apply to the movement of office cars. There is no obligation assumed to perform the service for any and all persons who may apply. An individual ar-

rangement is made in each instance, which the carrier called upon may grant or refuse in its discretion. The principle of the taxicab case applies, we respectfully submit, with persuasive and controlling force to the case under consideration.

This Court's decision in *Santa Fe R. Co.* v. *Grant Bros.*, 228 U. S. 177, emphatically asserts the principle for which we are contending. It holds that a common carrier may contract with a construction contractor, on such terms as they may mutually agree upon, with respect to the transportation of the cars containing the outfit of the construction company over the lines of the carrier in regular operation; and that the provisions of the law requiring published tariffs and prohibiting departures therefrom have no application to such a transaction. The rule that a common carrier, even as to matters involving transportation, may act in the capacity of a private carrier, with full liberty of contract in matters outside the performance of its duty as a common carrier, is thus stated (p. 187):

> Manifestly, this rule has no application when a railroad company is acting outside the performance of its duties as a common carrier. In such case, it is dealing with matters involving ordinary considerations of contractual relation; those who choose to enter into engagements with it are not at a disadvantage; and its stipulations even against liability for its own neglect are not repugnant to the requirements of its public service. The rule extends no further than the reason for it. It is apparent that there may be special engagements which are not embraced within its duty as a common carrier, although their performance may incidentally involve the actual transportation of persons and things, whose carriage in other circumstances might be within its public obligation. Baltimore & O. S. W. R. Co. *v.* Voigt,

176 U. S. 498, and cases cited; Northern P. R. Co. *v.* Adams, 192 U. S. 440; Long *v.* Lehigh Valley R. Co., 130 Fed. 870.

After referring to the *Voigt* case, in which it was held that an express messenger was not a passenger—that is, that the railway company was not a common carrier of the express messenger—the Court said (p. 186):

> In constructing, improving, or repairing its road, and in building its extensions and branches, the railroad company is providing facilities for its service as a common carrier, but, of course, is not acting as such.

In this connection, it will be noted that the officers and employees, in an office car moving over the line of another carrier, while not engaged in the physical construction of the road or its extensions and branches, are, nevertheless, performing their duties in connection with the operation of the road, which are quite as essential to the performance of its public service. They are improving and facilitating its service as a common carrier.

The Court adds (p. 188):

> The parties, then, were free to make their own bargains as to this transportation and the liability which should attach to it.

The Court also held that the terms of the compensation received by the railway company for the transportation involved, although less than tariff rates, were not to be governed by published tariffs, and did not constitute such a departure from published tariffs as amounted to a violation of the law. It said (p. 188):

> It is clear that in dealing with transportation of this character over its own road, in connection with

> construction or improvement, a railroad company is not acting in the performance of its duty as a common carrier, and the arrangement for free or reduced-rate carriage for the necessary materials and men used in the work, when it is a part of the contract, entered into in good faith, and not as a subterfuge, is not obnoxious to the provisions of law prohibiting departures from the published tariffs, for the reason that such an agreement lies outside the policy of these provisions.

The controlling considerations underlying this decision are equally applicable to the instant case. It is the policy of the law to impose upon common carriers public duties in favor of such members of the public as are entitled to demand their services in the particular matter. This is aptly expressed in *Atchison R. Co.* v. *Tiedt*, 196 Fed. 348 (certiorari denied, 225 U. S. 702), as follows:

> While a carrier in general has a duty to serve the public, the right to be served is in the public as such, and arises only when some individual demands a service that is common and due to him as a member of the public.

The essential feature of these public duties, without which they do not exist, is that common carriers hold themselves out as ready to perform specific services in the transportation of persons and property upon the same terms and conditions for all who may apply, up to the limit of the capacity of their facilities. For this purpose tariffs are published and all forms of favoritism and discrimination are prohibited.

But the policy of the law and the rules for its enforcement extend no further than the reason for them. Where a carrier performs services which are not public in nature,

that is, not offered to the public at large, the rule ceases to have any application. There is no necessity for published tariffs, for the reason that the public is not affected or concerned. Private contracts or arrangements may be made, and public policy protects them. In the case above cited, the carrier had not held itself out as a carrier of cars containing the outfits of construction companies. That was outside the scope of its public duties. It transported such cars only upon request in each individual instance, and upon terms mutually agreed upon, practically in the same manner as office cars are handled.

It is true that, in the case cited, the transportation was over the carrier's own line; but the underlying principles of the decision have equal application where the transportation is over the line of another carrier. The essential and controlling fact in the movement of an office car over a foreign line is that there is no holding out to the public of a readiness to transport for all, without which there is no public undertaking and no occasion for published tariffs or a uniformity of charge. In other words, the transportation is outside the scope of its public duties.

It is fully recognized by Congress that the duties of officers and employees of one carrier, in the proper operation of their own road, necessarily take them upon occasion over the lines of other carriers. This is plain from the provisions of Section 1, paragraph (7), of the Act, permitting "the interchange of passes for the officers, agents, and employees of common carriers." The same provision is in Section 22. No reason can be given for the interchange of passes between the officers, agents, and employees of common carriers except that they are required, in the necessary performance of their duties, to travel on other lines than their own. Congress recognized this fact and made

provision for it (*United States* v. *Erie R. Co.*, 236 U. S. 259).

The scope of a railway company's duties as a common carrier is limited and restricted to its undertaking; that is, to the extent to which it has held itself out, by published tariffs or otherwise, as ready and willing to perform certain services for all alike. Any service outside of its undertaking is a private carrier service. This principle is the basis of this Court's decision in the *Express Cases*, 117 U. S. 1, where it was sought to compel railway companies, as common carriers, to accept express matter and express messengers of other companies than the one having existing contract relations. The Court held that it was not the duty of carriers to furnish express facilities to all express companies which might demand them. It was put upon the ground that common carriers have not held themselves out as common carriers of express companies, just as, in the present case, the plaintiffs and other carriers have not held themselves out as common carriers of office cars. The Court stated the precise question for determination, as follows (pp. 21, 26):

> But it is neither averred in the bills nor shown by the testimony that any railroad company in the United States has ever held itself out as a common carrier of express companies, that is to say, as a common carrier of common carriers. On the contrary it has been shown, and in fact it was conceded upon the argument, that down to the time of bringing these suits, no railroad company had taken an express company on its road for business except under some special contract, verbal or written, and generally written, in which the rights and the duties of the respective parties were carefully fixed and defined.

> The exact question then is, whether these Express Companies can now demand as a right what they have heretofore had only as by permission. That depends as is conceded, on whether all railroad companies are now by law charged with the duty of carrying all express companies in the way that express carriers when taken are usually carried, just as they are with the duty of carrying all passengers and freights when offered in the way that passengers and freight are carried. . . . If they are entitled to the relief they ask it is because it is the duty of the railroad companies to furnish express facilities to all alike who demand them.

The railway companies were held not to be common carriers of express matter, or of express messengers, not only because they had never held themselves out as common carriers of express companies, but for the further reason that no railroad company had taken an express company on its road except under some special contract, precisely as it appears here that no carrier has ever taken and moved the office car of a foreign line except under some special contract or special arrangement.

The *Express Cases* were reaffirmed in *Baltimore & Ohio S. W. R. Co.* v. *Voigt*, 176 U. S. 498, where it is held that an express messenger, occupying an express car in charge of express matter, in pursuance of a contract between a railway company and an express company, was not a passenger, within the meaning of the rule of public policy which denies the validity of contracts limiting the liability of a carrier to a passenger for negligence.

The Court in the *Voigt* case referred to and apparently approved a number of cases, pointing out the line of demarcation between services performed by railway companies when acting in their common carrier capacity and

when acting as private carriers. In general, it is said that where the duty of transportation, whether of persons or property, is one which may be demanded as a matter of right, the public or common carrier duties of a railway company are involved. On the contrary, where the carriage cannot under the law be demanded as of right, the service is performed in a private carrier capacity.

Among the cases so cited and apparently approved is *Coup* v. *Wabash R. Co.*, 56 Mich. 111. There the railway company contracted with a circus proprietor to move a circus train. An accident occurred through the negligence of the railway company and an action was brought for damages. The contract under which the movement took place provided that the railway company should not be liable for damages, and this contract was upheld. The decision turned upon the fact that the railway company was not acting in its capacity as a common carrier, but as a private carrier, and hence was lawfully entitled to make such contracts as the parties might agree upon. The Court said:

> . . . But it is not incumbent on companies, in their duty as common carriers, to move such cars except in their own routine. They are not obliged to accept and run them at all times and seasons, and not in the ordinary course of business.
>
> It cannot be claimed on any legal principle that plaintiff could, as a matter of right, call upon defendant to move his trains under such circumstances and on such conditions; and if he could not, then he could only do so on such terms as defendant saw fit to accept.

Another case cited and apparently approved in the *Voigt* case is *Griswold* v. *New York & N. E. R. Co.*, 53 Conn. 371, where a restaurant keeper had the privilege to sell fruits and sandwiches on the trains and to engage and

keep a servant for that purpose on the trains, riding on a free pass. It was held that such servant could not recover for injuries received on the train caused by the negligence of the company's servants, because he was not a passenger. The decision was put upon the ground the railway company was not acting in the capacity of a common carrier, the Court saying:

> In the first place, the arrangement between the parties ought not to be regarded as a contract with the railroad company in its character as a common carrier, and therefore the stipulated exception is no abdication of that rigid responsibility which the law imposes on common carriers.

The Court in the *Voigt* case also cites, with apparent approval, *Robertson* v. *Old Colony R. Co.*, 156 Mass. 506, which was an action brought for personal injuries caused to the plaintiff, an employee of the proprietors of a circus, while riding in a car belonging to the proprietors, drawn by the defendant company over its road under a written agreement, in which it was provided that the circus company should agree to exonerate and save harmless the defendant from any and all claims for damages to persons or property during the transportation, however occurring. It was held that the plaintiff could not recover, and the decision was put upon the ground that the railway company was under no common law or statutory duty to carry the plaintiff in the manner he was carried at the time of the accident, and hence the parties were at liberty to contract as they did. In commenting upon this case, the Court in the *Voigt* case said (p. 515):

> . . . and it was held that, as the defendant company was under no common-law or statutory

> obligation to carry the plaintiff in the manner he was carried at the time of the accident, it did not stand towards him in the relation of a common carrier, and that the plaintiff could not recover.

The Court also referred to *Chicago, M. & St. P. R. Co.* v. *Wallace*, 66 Fed. 506, which was a circus case. The Court in its opinion in that case quoted and applied the following passage from *New York C. R. Co.* v. *Lockwood*, 17 Wall. 357:

> A common carrier may undoubtedly become a private carrier or bailee for hire when, as a matter of accommodation or special engagement, he undertakes to carry something which it is not his business to carry.

The Court in the *Voigt* case also referred to *Louisville R. Co.* v. *Keefer*, 146 Ind. 21, which was a suit by a messenger of the American Express Company against the railway company for personal injuries, and quoted from it as follows:

> Under the doctrine declared in the Express Cases, 117 U. S. 1, the property was being carried by appellant, not as a common carrier in the performance of a public duty, but being carried, with a messenger in charge, as a private carrier, the right to have it and him carried having first been secured to the express company by private contract, the only way known to the law by which the right, either as to goods or appellee as express messenger in charge, could be acquired.

In referring to *Pittsburgh R. Co.* v. *Mahoney*, 148 Ind. 196, the Court in the *Voigt* case said (p. 517):

> By the supreme court of Indiana, in Pittsburgh, C., C. & St. L. R. Co. *v.* Mahoney, 148 Ind. 196, it

was held that railway companies may contract as private carriers in transporting express matter for express companies, and in such capacity may require exemption from liability for negligence as a condition to the obligation to carry, and that a release by an employee of an express company of all liability for injuries sustained by the negligence of the employer or otherwise includes the liability of the express company to hold a railroad company with which it does business harmless against claims by the employees of the express company for injuries, and precludes an action against the railroad company for causing his death while in discharge of his duty as employee of such express company.

The Court's conclusion in the *Voigt* case is thus stated (p. 520):

> Without enumerating and appraising all the cases respectively cited, our conclusion is that Voigt, occupying an express car as a messenger in charge of express matter, in pursuance of the contract between the companies, was not a passenger within the meaning of the case of New York C. R. Co. *v.* Lockwood; that he was not constrained to enter into the contract whereby the railroad company was exonerated from liability to him, but entered into the same freely and voluntarily, and obtained the benefit of it by securing his appointment as such messenger; and that such a contract did not contravene public policy.

The holding of the English courts is to the same effect:

> *Lord Halsbury's Law of England,* Vol. 4, p. 2;
> *Johnson* v. *Midland R. Co.,* IV Exch. 367;
> *Dickson* v. *Great Northern R. Co.,* 18 Q. B. D. 176.

In the last-cited case the Court of Appeals decided that a railroad company was not a common carrier of dogs, for the reason that it had never held itself out as a common carrier of them. The statement of a railway company's common carrier obligations is so clear that we venture to quote the following:

> Lindley, L. J., said at page 183:
>
> At common law no person is bound as a common carrier to carry any goods of a kind which he does not profess to carry. Unless he professes to carry dogs for people in general, he is not bound to carry a dog for any particular individual; and if a carrier says he will not carry dogs except on certain terms, he can lawfully refuse to carry any particular dog on any other terms. In this case the defendants expressly say they are not common carriers of dogs and will not carry dogs except on their own terms. The common law, therefore, does not oblige the company to carry dogs at all; and at common law no action will lie against the company for refusing to carry a dog. Moreover, as no person is bound to enter into an agreement with one person simply because he is in the habit of entering into similar agreements with others, a company which is not a common carrier of dogs, but which may be in the habit of carrying dogs on certain terms, may at common law decline to accept any particular dog, even on those terms, and may refuse to carry the dog at all, or may refuse to carry it except upon some other terms which the company may specify. At common law, therefore, it seems to me the defendants can lawfully refuse to carry dogs except upon their own terms.

Lopes, L. J., said at page 188:

> Generally, railway companies like other carriers were common carriers of goods which they were bound by statute to carry, or which they professed to carry, or actually carried for persons generally, but not of goods which they did not profess to carry, and were not in the habit of carrying, or only carried under special circumstances or subject to express stipulations limiting their liability in respect of them.

Numerous other decisions might be cited, holding that a common carrier engaged in the performance of common carrier services, in accordance with its public undertaking, may, nevertheless, in the particular matter in question, be a private carrier, performing a private carrier service, with the incidents attaching thereto, including the right of private contract. A few of these decisions will be briefly referred to.

In *Robinson* v. *Baltimore & O. R. Co.*, 237 U. S. 84, it is held that a railway company is not a common carrier, but a private carrier, of Pullman porters.

In *Pullman Co.* v. *Missouri Pac. R. Co.*, 115 U. S. 587, it is held that a railway company is not a common carrier of Pullman cars.

In *Black & White Taxicab Co.* v. *Taxicab Co.*, 276 U. S. 526, and *Donovan* v. *Pennsylvania Co.*, 120 Fed. 215, it is held that railway companies are not common carriers of passengers or baggage from their stations.

In *The Wildenfels*, 161 Fed. 864 (C. C. A., 2d), it is held that a "lighter hired exclusively to convey the goods of one person to a particular place for an agreed compensation is not a 'common carrier' with respect to such goods, but a 'private carrier,' and liable only as a bailee for hire."

In *Huniting Elevator Co.* v. *Bosworth,* 179 U. S. 415, it was held that the Terminal Association of St. Louis was under no obligation as a common carrier to accept in train loads freight arriving over the road of another carrier; and that it was under no duty as a common carrier to allow the use of its yard for all purposes of such other carrier.

In *Louisville & Nashville R. Co.* v. *West Coast Naval Stores Co.,* 198 U. S. 483, it was held that the defendant railway company never became a common carrier as to a wharf built by it in the harbor of the city, at the foot of a public street, for the purpose of more conveniently procuring the transportation of freight beyond its own line by such carriers as it might select; and that the use of such wharf could not be demanded by a shipper on the payment of reasonable hire, for the purpose of employing vessels of his own selection for the further carriage of his goods.

In *Shoemaker* v. *Kingsbury,* 79 U. S. 369, it was held that when contractors building a railroad operate a construction train and take on a passenger for hire, they are, as to such passenger, private carriers only.

In *United States* v. *Louisiana & P. R. Co.,* 234 U. S. 1, it is held that the owners and operators of an internal system of trackage, however extensive, were not common carriers.

In *Atchison R. Co.* v. *Tiedt,* 196 Fed. 348 (certiorari denied, 225 U. S. 702), it was held that a common carrier is under no obligation, in its capacity of a common carrier, to operate a special train for a group of persons to which the public generally is not admitted, to be run on particular days and at particular hours to a suburban amusement park.

In 10 C. J., sec. 1066, p. 647, it is stated that "a carrier is not bound to receive or transport passengers on special trains or cars running for the particular purposes of the road, and not for the convenience of the traveling public."

In *Bankers Casualty Co.* v. *Minneapolis R. Co.*, 117 Fed. 434, (C. C. A., 8th) it was held:

> A railway company carrying U. S. Mails, whether under contract or by virtue of the requirements of the constitutional law, is not, with respect to such service, a common carrier.

In *Donovan* v. *Pennsylvania Co.*, 120 Fed. 215 (affirmed 199 U. S. 179), it was held that a railway company owes no common carrier duty to provide on its trains the opportunities for passengers to purchase newspapers, books, fruit, and the like, or to employ the services of a stenographer or of a barber, or to buy cab or express tickets.

In *Chenery* v. *Employer's Corp.*, 4 F. (2d) 826 (C. C. A., 9th), it appeared that Roberts and Ward were proprietors of a motor bus line operated as a common carrier on regular schedule between Papakura and Clevedon, 8 miles apart. In addition to operating the bus line between these points, they transported passengers to and from points beyond these towns, by special arrangement, consisting merely of a request for the transportation by telephone or otherwise and payment of the compensation agreed upon. This latter service was availed of by the plaintiff, who was injured in the course of the transportation, the point where the injury occurred being between the two towns where regular service was maintained. It was held that this was a private carrier service. The court said (p. 827):

> . . . Roberts and Ward were no doubt common carriers of passengers on their regular run between Papakura and Clevedon. It seems equally clear that they were mere private carriers when they undertook to carry passengers beyond their regular run by special arrangement or agreement.

In *Puget Sound International Ry.* v. *Kuykendall,* 293 Fed. 791, it is held:

> Electrical energy produced by a company which is not required for present needs of a public service may reasonably be called surplus, and its sale to private parties for power purposes is not subject to regulation by the Public Service Commission of Washington.

In *Meisner* v. *Detroit Ferry Co.,* 154 Mich. 545, the defendant was a common carrier of passengers by ferry between Belle Isle and certain cities. It purchased an island near the mouth of the Detroit River, developed it as an amusement park, and operated two of its boats twice daily between Detroit and the park, carrying excursions of various societies to the island. The court held that the service was a private carrier service, saying:

> The sole business in which the defendant is engaged with these boats is carrying passengers to and from its private pleasure grounds. . . . It is not engaged in the general carriage of passengers for business and pleasure. It invites such persons and parties as it chooses, and upon such terms as it chooses to make, to visit its own grounds, provided, as above stated, with the means of entertainment, amusement, and sport. It is in all essentials as private an enterprise as that of a theater, a circus, or a race track.

In *Houle* v. *Lewonis,* 140 N. E. 427, it was held that, while a truckman or teamster, holding himself out as a common carrier, will be liable as such, he is subject to the duties of a common carrier only within the territorial limits to which he devotes his common service.

In *Ney* v. *Haun*, 131 Va. 557, the defendant was licensed to carry goods in Bridgewater, but had not made a practice of trucking outside the town, although once before for the plaintiff's brother he had made a trip with his truck to Washington. The plaintiff engaged him to move his goods from Harrisonburg to Washington, and on the trip the goods were injured by the overturning of the truck. It was held not error to refuse a requested instruction of the plaintiff which rested upon a common carrier degree of liability.

The true test to determine whether the transportation is in the capacity of a common carrier or of a private carrier for hire is the existence or non-existence of a legally enforceable obligation to perform the service.

The real criterion, says this Court in *United States* v. *Louisiana R. Co.*, 234 U. S. 1, 24, is not the extent of the business, but "the right of the public to use the road's facilities and to demand service of it."

In *Hutchinson on Law of Carriers*, Vol. 1 (3d Ed.), Sec. 62, the author expresses this test in the following language:

> Lastly, the party must be under such a legal obligation to carry that an action will lie against him for a refusal without sufficient excuse. "The true test of the character of a party, as to the fact whether he is a common carrier or not," says Chief Justice Simpson, "is his legal duty and obligation with reference to transportation. Is it optional with him whether he will or will not carry, or must he carry for all? If it is his legal duty to carry for all alike who apply, with the terms as to freight, etc., then he is a common carrier, and is subject to all those stringent rules which, for wise ends, have long been adopted and uniformly enforced, both in Eng-

land and in all the states, upon common carriers. If, on the contrary, he may carry or not, as he deems best, he is but a private individual, and is invested, like all other private persons, with the right to make his own contracts, and when made, to stand upon them." "One of the obligations of a common carrier," says Nisbet, J., "is to carry the goods of any person offering to pay his hire; with certain specific limitations, this is the rule. If he refuses to carry, he is liable to be sued, and to respond in damages to the person aggrieved, and this is perhaps the safest test of his character."

In *4 Elliott on Railroads*, Sec. 2101, it is said:

> In other words, where there is a right to refuse to perform the services requested, there is a right to contract for their performance in a different capacity from that which rests upon a railroad company as a common carrier.

In *Fish* v. *Chapman*, 2 Ga. 349, 354, it was held that the liability to an action for refusal to carry is the safest criterion of the character of the carrier.

In *Ex Parte Alabama Great Southern R. Co.*, 206 Ala. 400, the court said:

> . . . Where there is a right of refusal by the common carrier to perform the service or act, there exists the right of contract for the performance of such act or service (if not *ultra vires*), in a different capacity from that which rests upon it as such common carrier. We apprehend that it cannot be successfully maintained that mandamus would lie against the Alabama Great Southern Railroad Company as a common carrier to compel it to park the cars of appellee for the period indicated, since such parking of such cars is not a duty it must discharge on application by

> any one of the general public, or by Mr. J. L. Wood, by reason of its being a common carrier.

To the same effect are:

> *Sante Fe R. Co.* v. *Grant Bros.*, 13 Ariz. 186, 192; *Schanen-Blair Co.* v. *Southern Pacific Co.*, 68 Ore. 106, 111.

The principles announced in the foregoing decisions received the Commission's approval in *Carr* v. *Northern Pacific R. Co.*, 9 I. C. C. 1, decided in 1901. There, the complainant, who had purchased a second-hand parlor car and fitted it up as "a traveling sample room," demanded the transportation of his car, with stop-over privileges at towns where business might be transacted, upon the same rate applicable to cars occupied by tourists, theatrical troupes, or other persons traveling in company. He was charged a higher rate and complained. The Commission said (p. 12):

> The defendant may decline to haul private cars at all, no matter by whom or for what purpose used, and a uniform rule to that effect would be entirely consistent with its public obligations. The defendant may also, as we think, haul private cars of a certain class, and refuse at the same time to haul others of a wholly or substantially different class.

The Commission also held that the complainant and his car constituted a different class from the others to whom a private car service had been extended, and that charging the higher rate did not constitute discrimination.

We feel that the decisions of this and other courts, as well as text writers, fully recognize the fundamental, underlying principles which establish the right of railway com-

panies to move each others' office cars to facilitate their operations upon such terms as they may mutually agree upon. This is a typical reciprocal service, where the carriers, as the lawful owners of their properties, have the right to make and conduct them in their own interest. They have assumed no obligations to the traveling and shipping public with respect to such movements. The public is not authorized or permitted to use these facilities or avail itself of this service. Because the service does not affect them, there can be no prejudice or discrimination. True, the movement of office cars in the past has been without charge, *eo nomine*. But, like the interchange of passes between carriers subject to the Act and those not subject to the Act, there may be "business reasons" which justify the exchange (*United States* v. *Erie R. Co.*, 236 U. S. 259, 271-272). In the same case, the lower court (213 Fed. 291, 295) explained the business reasons as "a desire to curry favor with persons having business to place"; and it characterized it as a "mutual backscratching" which had not yet been made sinful. Future movements of office cars, if this action is successful, may be gratuitous, or may be upon a basis of charges mutually agreed upon. The important thing is that, being a private carrier service, the parties have a lawful right to agree what the charges shall be, or that there shall be no charges other than the "business reasons" just referred to.

In the last analysis, the decisive and controlling question is whether the movement of an office car by and over a foreign line is an obligation, the performance of which can be compelled by the courts. No one will seriously contend that the carriers of the country have ever assumed any obligation to transport office cars for all who may apply. They have never held themselves out as common

carriers of office cars. Office cars have never been transported under tariffs, and there is no tariff applicable to such a movement. How can it be said, therefore, that there is an obligation to move office cars which courts will enforce by appropriate action? In all the cases above cited illustrating private carrier movements, it is obvious that such movements could not be coerced through the courts, for the simple reason that no duty or obligation exists to perform the service for the public generally.

Nor can a private carrier service be changed into a common carrier service by any legislative fiat, or by any order of the Commission. This principle is too well established to require argument (*Michigan Public Utilities Commission* v. *Duke*, 266 U. S. 570, 577; *Producers Transportation Co.* v. *Railroad Comm.*, 251 U. S. 228; *Wolff Packing Co.* v. *Court of Industrial Relations*, 262 U. S. 522).

II.

The lower court erred in holding that plaintiffs and other railway companies of the country are common carriers of the office cars of other carriers, and under a legal obligation, created by published tariffs, to accept and transport them thereunder.

We have shown that the duty of a common carrier to perform a particular service depends upon whether it has assumed an obligation, by published tariffs or otherwise, to perform such service for the public generally, and that the test of such public service is the right of some member of the public to demand and enforce a performance of the service by resort to legal process. We now proceed to point out that plaintiffs and other carriers have never assumed

any common carrier obligation to the public or to any one else to accept and move office cars; and that, as no such public obligation exists, the carriers are free to make such movements upon such terms as they may mutually agree upon, without coercion or restraint through the publication of covering tariffs. And we also point out what we regard as the error of the lower court in its holding to the contrary.

The lower court erred, we respectfully submit, in its holding that the movement of an office car over the line of another carrier is covered and controlled by published tariffs. Its ruling and the reasons for the ruling are thus stated (R. 142):

> It is not necessary to consider what might be the law if railroad companies did not hold themselves out as common carriers of private cars. They do. They have established tariffs for the transportation of such cars. That is a part of their common carrier business. It is within the scope of their chartered powers. As to such transportation therefore they cannot, if they would, divest themselves of the character of common carriers by any private contracts.

It should be noted, in passing, that the whole scope and purpose of the Commission's order is to require the railway companies to put into effect tariffs covering office cars, on the ground that the published tariffs now in force do not cover such movements; or, in the alternative, to abstain from the transportation of the office car of another carrier. The Commission's proceeding and order were quite unnecessary and futile if such tariffs have been in effect, as the lower court says they were.

We turn to the uncontradicted facts in the record, which, we contend, plainly and clearly refute the lower court's broad statement that the carriers have published tariffs

covering the movements of office cars. It will be borne in mind that the only tariff provision described by the Commission, and claimed by the court to cover office cars, is the one which provides for the movement of "special, privately owned, or chartered cars for the exclusive use of special parties." The Commission describes this tariff in the following language (R. 113):

> Special, privately owned, or chartered cars for the exclusive use of special parties are transported in passenger trains under tariffs which provide for certain minimum revenues.

The lower court bases its decision upon the assumption that this tariff provision covers the movement of office cars. But the facts speak emphatically to the contrary.

The Commission, whose particular province it is to construe tariffs, and whose construction carries great weight (*Emmons Coal Co.* v. *Norfolk R. Co.*, 272 U. S. 709, 712), held that the tariff provision did not cover office cars owned by railway companies. It ruled that this tariff provision applies only to cars owned by "others than the carriers"—which naturally means that it had no application to cars that are owned by carriers, such as the office cars in question. It said (R. 114):

> The term privately owned cars is not defined in the tariffs, but its obvious meaning is cars owned by others than the carriers.

Notwithstanding the Commission's plain ruling, the lower court states that the railway companies hold themselves out as common carriers of office cars, which are owned by the carriers, and that they have published tariffs for the transportation of such cars. This is the basis of

its decision. This erroneous ruling, we contend, is in itself sufficient evidence of prejudicial error against the appellants to require a reversal of the decree below. But there are additional reasons which lead to the same conclusion.

Both defendants in their answers, following the Commission's ruling, admit that the tariffs "do not expressly name charges on carrier-owned private or office cars transported by other carriers for exclusive use of the owning carriers or their officials." They also admit the facts which characterize a private carrier movement, made upon special request in each individual instance, and which distinguish it from a common carrier movement, made upon published tariffs open to the general public; namely, that it has long been the practice of carriers throughout the country to move office cars of other carriers without making any charge therefor, and that such movements have been upon special request; that such office cars do not become or constitute any part of the common carrier equipment of the transporting carrier, and that such cars are not available for the general use of passengers traveling over the line of such transporting carrier.

The Commission said in its answer (R. 19):

> Answering the allegation, in subdivision numbered 10 of the petition, that the tariffs of petitoners and other carriers do not provide for or cover the movement of the office cars of other carriers, the Commission alleges that the tariffs of petitioners and other carriers name certain minimum charges on privately-owned or chartered cars transported for the exclusive use of special parties, but the Commission admits that said tariffs do not define the term privately-owned cars, and admits that said tariffs do not expressly name charges on carrier-owned private or office cars transported for the exclusive use

of the owning carriers or their officials. Further answering said subdivision 10, the Commission admits that the movements over foreign lines of the private or office cars of other carriers have been made upon special request; admits that it has been the long-continued and uniform practice throughout the country to make such movements without making any charge whatsoever therefor; admits and alleges that such cars do not become or constitute any part of the common carrier equipment of such foreign lines; and admits and alleges that such cars are not available for the general use of passengers travelling on such foreign lines.

In the answer of the United States it is said (R. 14):

> It admits the allegation in said paragraph 10 that said tariffs of petitioners and other carriers do not expressly name charges on carrier-owned private or office cars transported by other carriers for exclusive use of the owning carriers or their officials, but alleges that said tariffs do name certain minimum charges for the transportation of privately owned or chartered cars transported for the exclusive use of special parties, and admits that said tariffs do not define the term "privately owned cars"; it further admits that it has long been the practice of carriers throughout the country to move private or office cars of other carriers without making any charge therefor; and admits and alleges that when so transported, such cars do not become or constitute any part of the common carrier equipment of the carriers transporting them; and further admits that such cars are not available for general use of passengers traveling on the lines of the transporting carriers.

These answers admit facts from which it necessarily follows that the movement of an office car, owned by a

carrier, over another line is, and always has been, a private carrier service, and that such movements have never been made under or pursuant to any published tariffs.

In the first place, it is conceded that the movements have been gratuitous; and it is clearly established that a carrier without hire is a private carrier (*Moore, Law of Carriers*, Vol. 1 (2d Ed.), Sec. 2, p. 2; *Hutchinson on Carriers*, Vol. 1 (3d Ed.), Sec. 16, p. 15; Sec. 61, p. 57; *Citizens Bank* v. *The Nantucket Steam Boat Co.*, 2 Story, 16, 35; *Chouteau & Valle* v. *Steam Boat St. Anthony*, 16 Mo. 216; 10 Corpus Juris, Sec. 15; *Northern Pacific R. Co.* v. *Adams*, 192 U. S. 440; *Self* v. *Dunn & Brown*, 42 Ga. 528; *Littlejohn* v. *Jones*, 2 McMullan's Reports, 365; *Knox* v. *Rives*, 14 Ala. 249; *Cincinnati* v. *Boal*, 15 Ind. 345).

In the next place, the published tariff is an offer to the traveling and shipping public to perform certain services for a stated compensation. When accepted, it becomes a contract, and is construed as other contracts are. The rule that if a contract be ambiguous, the practical construction placed upon it by the parties during a long period of time, before any controversy arises, will be given great weight, and in many cases controlling effect, applies with peculiar force here. "Tell me what you have done under such a deed and I will tell you what that deed means" (*Attorney General* v. *Drummond*, 1 Drury & Warren, 352). This rule has been emphasized in numerous instances by this and other courts (*Chicago* v. *Sheldon*, 9 Wall. 50, 54; *Topliff* v. *Topliff*, 122 U. S. 121).

For nearly a century, during which office cars have been in use upon the railroads of this country, it may safely be said that not one have ever moved under a published tariff, prior to the Commission's order in this case. No one has ever contended that such movements were governed by

tariffs, until the institution of this suit. It has been universally conceded by carriers and by the Commission, as well as by the traveling and shipping public, that such office car movements were private carrier movements, made upon request in each particular instance, either free or upon such terms as the interested parties might agree upon. This practical construction by carriers, public authorities, shippers and passengers alike over this long period of time necessarily excludes office car movements from the scope and effect of any published tariff whatsoever.

In the third place, if the question were one of first impression, instead of being foreclosed, as we contend it is, by the Commission's finding, by the facts stated in the defendants' answers, and by the long-continued construction placed by the interested parties, it is clear, from a consideration of the tariff provisions themselves, that they have no application to movements of office cars. The tariffs cover "special, privately owned, or chartered cars for the exclusive use of special parties" and represent the public undertaking of the carriers to transport such chartered cars and their occupants in regular revenue service for all members of the public who may apply therefor and pay the published charge; that is, for passengers for hire, holding—not free passes—but a minimum number of first-class tickets. It is a declaration by the carriers of their readiness to perform a common carrier service of a precise nature and for a specified consideration, which creates an obligation in favor of passengers for hire who comply with the conditions; and this obligation may be enforced in court, if necessary.

Manifestly, the movement of an office car does not come within the scope of this tariff provision. The office car, as the defendants specifically admit, is not a part of the com-

mon carrier equipment of the transporting company, and is not available for occupancy by passengers on the line of the transporting company. It is not now, and never has been, a service offered to the public by railway companies in their common carrier capacity. It is distinctly an inter-company transaction. It is a reciprocal arrangement, by which the business of the interested companies is mutually facilitated.

Doubtless, the lower court's error was induced by its unwarranted assumptions; first, that the published tariffs cover private cars; secondly, that an office car is embraced within the term "private car". It makes the unqualified statement in its opinion (R. 142): that railway companies do in fact hold themselves out as common carriers of "private cars". Then it assumes that an office car is a private car; and, upon this assumption, it reaches the conclusion that an office car comes under the tariffs.

There is no mention in the tariffs of "private cars". The nearest approach to it was the expression "privately owned cars", which the Commission said did not include cars owned by the carriers. The lower court's statement that the tariffs cover private cars cannot, therefore, be strictly accurate.

But even if we assume, for the sake of the argument, that the lower court was correct in its assertion that the published tariffs do cover "private cars". Do the words "private cars" include office cars? Certainly not. Office cars are carrier-owned cars. The standard definition of a private car is "in railroad terminology, a car not of railway ownership" (50 C. J. 371). See also *In the Matter of Private Cars*, 50 I. C. C. 652, 656; and *United States* v. *Berwind Mining Co.*, 274 U. S. 654, 658.

While the lower court did not so intend, its reasoning, in the light of the standard definition of a private car, must be deemed to run somewhat as follows: The tariffs cover private cars; that is, cars owned by others than the railway companies. Office cars are owned by railway companies, and hence they are covered by the tariffs. The fallacy of the argument is plainly evident and needs no comment.

III.

The transportation or movement of the office car of another carrier, upon such terms as the interested carriers may agree upon, cannot be unjustly discriminatory, or unduly preferential and prejudicial, since it is strictly an inter-company matter, in which no member of the traveling or shipping public is concerned, and in which no public interest is affected.

While carriers are held to a strict accountability for the performance of their "own immediate duties to the public" (163 U. S. 564, 589), and are not permitted to escape their responsibility therefor, the law places no limitation or restriction upon the methods or instrumentalities which they may adopt for the purpose of performing their public duties. It is well known that there are a large number of inter-carrier contracts and relations which aid and facilitate the performance of common carrier or public duties, but do not constitute any part thereof. Public regulation does not concern itself with these inter-company matters, since they cannot prejudice, or discriminate against any member of the traveling or shipping public.

We contend that the movement of an office car of another carrier is an inter-company transaction of a reciprocal

nature which facilitates the operation of the properties of the carriers involved and aids them in the performance of their public duties, but that such movements constitute no part of such public duties, and for that reason public regulation does not extend to them. Invoking this rule, we respectfully submit that there was no evidence before the Commission supporting its finding that it is unjustly discriminatory, and unduly preferential and prejudicial, to haul the office car of another carrier free or at less than published tariff rates, while charging certain minimum fares and revenues for movements of privately owned or chartered cars; and that the lower court erred in sustaining the Commission's finding in that behalf.

From the very beginning, it has been the constant practice of carriers to make such contracts and arrangements between themselves, and with other persons, as they deemed essential for the performance of their public duties. While the law exacted the strictest performance of these public duties, it has left the carriers substantially to their own devices, without compulsion or restraint, in the acquisition of property, in providing facilities, and in inter-company arrangements deemed mutually beneficial, by which the performance of their public duties may be aided and facilitated. These inter-company contracts and arrangements have never been considered a part of the carriers' public duties or subject to public regulation. The plain reason is that they do not affect any member of the shipping or traveling public, either with respect to charges or service. This finds illustration in *Santa Fe R. Co.* v. *Grant Bros., supra.*

A few of the many illustrations of inter-company relations will be referred to for the purpose of showing that they are outside, and independent of the carriers' public

duties, and that, for that reason, they cannot be said to create preference, prejudice or disadvantage to any member of the public.

It may be said, in passing, that the general right of the carriers to enter into these inter-company contracts has been recognized and sustained (*Union Pacific R. Co.* v. *Chicago, R. I. & P. R. Co.*, 163 U. S. 564, 589). In Missouri, where one of the plaintiffs is incorporated, the statute (Sec. 9911, Revised Statutes, 1919), putting the general rule into statutory form, expressly authorizes all railroad companies to "contract with each other, or with other corporations, in any manner not inconsistent with the scope, object and purpose of their creation and management." It has been held that this statute confers authority to contract by lease or operating agreement, or for a temporary permission or a parol license, to use and occupy the line of one company to expedite the trains of another (*St. Joseph R. Co.* v. *St. Louis R. Co.*, 135 Mo. 173).

A common form of the inter-company arrangement is the trackage contract, whereby one railroad is permitted to use the tracks and facilities of another carrier for the performance of its public duties (*Union Pacific R. Co.* v. *Chicago, R. I. & P. R. Co.*, 163 U. S. 564; *Chicago, R. I. & P. R. Co.* v. *Denver & Rio Grande R. Co.*, 143 U. S. 596; *St. Louis, K. C. & C. R. Co.* v. *Wabash R. Co.*, 217 U. S. 247). So long as the carrier enjoying the trackage rights performs its own immediate duties to the public in the transportation of freight and passengers, the public is not concerned with the terms of the contract between the two companies. The amount of rental paid and the terms under which the operations are conducted do not affect any member of the traveling or shipping public, either in the service performed or the rates, fares and charges paid. No one

has ever ventured to put forward the claim that the cars and engines of the company enjoying the trackage rights constitute property, as the Commission asserts of office cars in this case, and hence can only be moved over the rails of the other company at tariff rates.

While a carrier is under obligation to provide ample and proper equipment for the transportation of passengers and freight, the law does not concern itself with the means which the carrier employs to provide itselt with such equipment. It is a matter of no interest to public regulation whether the carrier purchases its own equipment or contracts with some other company to provide the equipment, under some form of lease or rental. A carrier may contract with another company to supply drawing room and sleeping cars (*Chicago, St. L. & N. O. R. Co.* v. *Pullman Southern Car Co.*, 139 U. S. 79, 89). It may contract with other persons to supply it with freight cars of various kinds and designs (*Assigned Car Cases*, 274 U. S. 564). So long as a carrier is supplied with equipment of the requisite number and quality, it is a matter of indifference to the public who owns it; and the terms of the contracts under which it is secured are likewise a matter of indifference to the public. The obvious reason is that these contracts do not in the slightest degree affect the charges paid or the services rendered to the public. Of course, this equipment is property: but no one has ever suggested that it can only move at tariff rates.

A carrier may lease a portion of its right of way or other property to private persons for elevators, warehouses, or other structures for their own benefit, provided it does not thereby disable itself from performing its public duties (*Hartford Fire Ins. Co.* v. *Chicago, M. & St. P. R. Co.*, 175 U. S. 91, 99). Here, again, no passenger or shipper

is affected, and for that reason such arrangements are beyond the scope of public regulation.

A carrier by railroad may grant to another carrier engaged in transporting oil by pipe line the right to lay its pipe lines along the roadbed, on such terms as the interested parties may agree upon (*National Transit Co.* v. *Davis*, 6 F. (2d) 729). The Court of Appeals, Third Circuit, held that no right possessed by any member of the public was affected thereby, and that the parties had a right to contract as they saw fit, saying (pp. 730, 733):

> Turning to the contract, which is the underlying feature of all questions involved, we note that such contract in no way concerned or affected the duty of the railroad as a common carrier. It was simply an agreement by which the transit company obtained permission to use the property of the railroad in carrying on its own business of transporting oil. Such being the case, it follows that no questions of public policy are involved in, or affected by, the contract, and therefore the parties are unhampered in their general right to contract with each other as they saw fit. . . .
>
> The contract in suit did not take away or lessen any right possessed by any member of the public.

A railway company may contract to transport ballast for another carrier for cost of transporting in work trains, instead of the amount fixed by tariffs, where the transporting carrier has an interest in the transportation (*Oklahoma Belt Ry. Co.* v. *Schaff*, 282 Fed. 138 (C. C. A., 8th)).

Both railway companies and express companies are held to strict responsibility for the performance of their public duties, but they may enter into inter-company contracts whereby express matter and express messengers are trans-

ported over the line of the railway company. The terms of these contracts do not affect or concern any passenger or shipper over the railroad, or any shipper of express matter, and hence are not subject to regulation (*Express Cases*, 117 U. S. 1).

It may well happen that a railway company may transport identical articles on the same day, and even in the same train; some of them in its capacity as common carrier and others under its contract with an express company. The railway company receives tariff rates for what it transports as a common carrier; and a lesser compensation, fixed, not by tariff, but by contract, for what it transports for the express company; but no one will contend that the railway company is thereby guilty of unjust discrimination or undue preference or prejudice. The shipper by express pays the published tariff rates of the express company, and the shipper by railroad pays its tariff rates. Neither is affected or concerned by the inter-company arrangements of the two companies, and neither can be prejudiced thereby.

A railway company owes its passengers the duty of providing a suitable way for them to reach and leave its station and grounds. It may perform this duty by an exclusive contract with a taxicab company and exclude from its station grounds all other taxicab owners. Such inter-company contracts give rise to no illegal discrimination (*Black & White Taxicab Co.* v. *Brown & Yellow T. Co.*, 276 U. S. 518). The terms of the inter-company contract are not a matter of public concern so long as the carrier's public duties to its passengers are complied with.

An apt illustration of an inter-company contract by which the carrier's public duties are aided and facilitated, but which, nevertheless, is no part of its public duties, is found in the standard form of detour agreement, a copy

of which appears as Exhibit C. This agreement provides for the operation of trains over the tracks of a foreign line when the operation of the home line is interrupted by washout or other temporary cause. The movement over the foreign line may be made with the engine and engine crew of the foreign line, or with the engine and engine crew of the home line. Charges for the service are fixed by agreement of the parties. Obviously, these charges do not affect the rates, fares and charges payable by shippers or passengers in accordance with published tariffs. They merely constitute a part of the expense payable by the carriers as an incident to the performance of their public service.

No one has ever suggested that these detour movements should be covered by published tariffs, for the obvious reason that neither the movement of the cars, nor the charges therefor, affect any member of the shipping or traveling public. No one has ever contended that the foreign line in moving the cars of the home line at less than published tariff rates was guilty of preference or discrimination, even though the equipment, as well as the contents of the cars when under load, constitutes property, to the same extent that an office car may be said to constitute property. The Commission has never undertaken to prohibit these movements except under published tariffs.

Another apt illustration of an inter-company contract by which carriers' public duties are aided and facilitated is to be found in the Commission's Conference Ruling No. 217, which provides for the return to destination of astray shipments billed to an erroneous destination or unloaded short of destination or carried by. The Commission ruled that the return of astray shipments may be made by carriers without assessment of charges, and upon such terms as are mutually agreeable; and without the filing of any

covering tariffs. The ruling, which was first promulgated on May 6, 1907, is as follows:

> Instances occur in which, through error or oversight on the part of some agent or employee, a shipment is billed to an erroneous destination or is unloaded short of destination or is carried by. The Commission is of the opinion that in *bona fide* instances of this kind carriers may return such astray shipments to their proper destination or course without the assessment of additional charges, and may arrange for such movement of such astray shipments for each other on mutually acceptable terms without the necessity of publishing, posting, and filing tariff under which it will be done.

Why does the Commission rule that astray shipments may be moved free or on such terms as the interested carriers may agree upon, and that no tariffs need be published, posted or filed to govern the movement? Obviously, for the reason that the return of astray shipments is purely an inter-company transaction which does not affect the public in the slightest degree. The charges paid by the shipper is neither more nor less by reason of the return movement of the astray shipment; nor is the matter of service affected in any degree. Manifestly, the return of astray shipments is not a common carrier movement; it is a private carrier movement, and, hence, the parties may contract as they please with respect thereto.

It may also be noted that the United States Postal authorities, who so jealously guard the postal revenues and severely punish any infractions of the postal laws and rules of the Department, nevertheless permit mail to be carried between connecting carriers outside of the mails and without the payment of postage, where such mails

affect the mutual business of the interested companies. In "Postal Laws and Regulations of the United States of America," edition of 1924, page 502, sections 1261, paragraphs 2 and 3 read as follows:

> 2. A railroad or steamboat company or other common carrier may carry outside of the mails letters written and sent by its officers and agents which relate to its business only, without inclosing the same in stamped envelopes. Such letters may be to other of such carriers' officers and agents, to those of connecting lines, or to anyone else, so long as no other carrier intervenes.
>
> 3. Letters of a company or carrier addressed to officers or agents of a connecting line on business relating to such company or carrier and delivered to an agent of the latter at the point of connection may be carried, and such carriage continued by the connecting company or carrier.

While no question of common carrier or private carrier is directly involved in the quoted regulations, they are, nevertheless, a clear recognition of the policy of the Government with respect to inter-carrier transactions and relations which are for their mutual benefit and which facilitate their operations as common carriers.

Why do not the rules and principles applying to inter-company contracts which aid and facilitate the carrier in the performance of its public duties apply with equal and compelling force to the movement of the office car of another carrier? The office car, it is to be remembered, is occupied exclusively by officers and employees of the company owning the car, engaged in the performance of their duties connected with the operation of their own railroad. They are facilitating the common carrier operations of

their railroad, quite as much as they would be if they were strengthening the roadbed or repairing the equipment. They are preparing the railroad for the better performance of its public duties.

Why may not the interested companies enter into inter-company contracts covering the movements of office cars? The advantages to the companies involved are manifest. The absence of prejudice to the public is equally manifest. The arrangement between the companies is reciprocal; one company may be benefited today, and the other one to-morrow. The extent of the service rendered, each to the other, may be equal, or it may be unequal. There may be, as pointed out above, other moving considerations besides the exact measure of the service rendered. Our contention is not that the service should be gratuitous in all cases, but that the parties should have full freedom of contract, to make their own bargains unhampered by the Commission's dictation.

How can it be said that any member of the shipping or traveling public is affected in the slightest degree, much less prejudiced or discriminated against? No member of the public has any right to travel in an office car, since that right is limited to officers and employees traveling on official business. No member of the public has a right to have an office car transported, as office cars are ordinarily transported, since that right is also limited to officers and employees traveling on official business.

How can it be said that the occupants of any special, privately owned, or chartered car, having their car moved under the tariff, upon the payment of 25 cash fares, are prejudiced or discriminated against by the free movement of an office car? No one will contend that they are prejudiced or discriminated against by the fact that the engine-

men, baggagemen, express messengers, train employees, and Pullman employees on the same train ride free. The latter are not traveling as passengers for hire, but as employees in the performance of their duties. They constitute a class separate and apart from passengers for hire. The occupants of an office car stand in precisely the same relation as the employees on the train. They also constitute a class separate and apart from passengers for hire.

Numerous illustrations of what constitute separate classes for transportation purposes might be given, and a few will be referred to.

In *Interstate Commerce Commission* v. *Baltimore & Ohio R. Co.*, 145 U. S. 263, it is held that a party rate ticket, which is a single ticket covering the transportation of ten or more persons, does not discriminate against ordinary passengers, although sold at a reduction from the regular passenger rates. The party of ten, traveling together, constitutes a different class from a party of ten, traveling separately.

In *United States* v. *Chicago & North Western R. Co.*, 127 Fed. 785, it is held that the Government, in the transportation of its soldiers in lots of ten or more, is not entitled to the benefit of a reduced ten-party rate, given by the railway company's schedule to "theatrical, operatic, or concert companies, hunting and fishing parties, glee clubs, brass or string bands, boat, baseball, polo, or tennis clubs, football teams, and other parties of like character." The decision is put upon the ground that the soldiers constitute a different class from the others enumerated. The Government "does not in any way come in competition of any kind with any of the parties who are given the party rates." In the same case, it is held that it has always been lawful at common law, as well as under the statute,

to allow ministers of the gospel to travel on half-fare tickets, for the reason, says the court, that "they do not come in competition with business men, and no injustice is done to anybody."

The Commission itself, in *Carr* v. *Northern Pacific R. Co.*, 9 I. C. C. 1, held that the owner of a second-hand Pullman parlor car, remodeled and fitted up as "a traveling sample room," was in a different class from "pleasure seekers, hunting and fishing parties, theatrical companies, and the like", and might be charged a higher price, without constituting preference or discrimination. Manifestly, there there is much greater reason in this case than in the cases cited to hold that officers and employees of a carrier engaged in the performance of their duties while traveling in an office car, constitute a different class from passengers for hire traveling in special, privately owned, or chartered cars.

The sole ground on which the Commission and the lower court predicated the finding of unjust discrimination and undue preference and prejudice was the fact that the office car movements in the past have been free, whereas the movements of special, privately owned, or chartered cars have been at tariff rates. This fact, says the lower court, "is alone sufficient evidence of discrimination" (R. 144).

Aside from the fact that a mere difference in charges does not constitute illegal discrimination (*Texas & Pacific R. Co.* v. *Interstate Commerce Commission*, 162 U. S. 197, 239), it is established that unjust discrimination, under Section 2 of the Act, deals with shippers, and requires substantial equality among shippers. It is said in *Wight* v. *United States*, 167 U. S. 512, 517, in speaking of Section 2:

> The wrong prohibited by the section is a discrimination between shippers. It was designed to

> compel every carrier to give equal rights to all shippers over its own road.

This is repeated in *Interstate Commerce Comm.* v. *Alabama Midland R. Co.*, 168 U. S. 144, 166, and in other decisions.

Clearly, a carrier, in requesting the movement of its office car over another line, is not a "shipper", any more than when it moves its equipment, or has it moved, over the line of another company under a trackage agreement; or when it moves its cars, or has them moved, over terminal tracks, or in terminal yards; or when it moves its cars over another line under a detour agreement; or when its passenger equipment, in service as well as "deadhead", moves over another line in joint service; or when its freight cars move over another line in a through route movement, under a joint rate; or when its astray shipments are moved free over the line of another carrier.

A shipper is a member of that public to which a common carrier service is offered, through the medium of published tariffs; he as an individual commands a service that is common and due to him as such member of the public (*Atchison, T. & S. F. R. Co.* v. *Todd*, 196 Fed. 348; certiorari denied, 225 U. S. 702). The same case holds that where an individual separates himself from the public and demands a use of a common carrier's property or facilities, not in the common right, but for his own profit or advantage, he is no longer entitled to common carrier service. In other words, he ceases to be a shipper or passenger.

It seems too clear for argument that a carrier desiring the movement of its office car by another carrier does not invoke the performance of any public duty which is owing to the public generally, and for that reason it is not a ship-

per. As to it, the transporting carrier assumes no common carrier duties; it is not an insurer, but a contractor, performing an inter-company service.

In order to constitute unjust discrimination, there must be discrimination against shippers, in a "like and contemporaneous service"; in the transportation of "a like kind of traffic, under substantially similar circumstances and conditions". It needs no extended argument to demonstrate that the office car service in question is wholly unlike the service performed in the movement of special, privately owned, or chartered cars. The traffic—if traffic it may be called, in the case of an office car—is essentially different, and the circumstances and conditions are fundamentally dissimilar.

The transportation of special, privately owned, or chartered cars is a common carrier service under published tariffs, available to the entire body of the public. Any individual can demand the service as a matter of right, upon the payment of the requisite 25 first-class fares. It is essentially a revenue movement; a commercial transaction entered into for the sake of expected profit. It is a service which the carrier can not refuse to perform. If it sought to do so, the courts would enforce performance. There is no limitation upon the class of persons who may occupy the car. There is no restriction whatever upon the purposes or objects of their journey. They may travel in the pursuit of business or for the mere sake of travel and recreation, as they may desire.

The office car, on the other hand, is not covered by any published tariffs. It is not a service available to the public, which any member of the public may demand as a matter of right. The carrier requested to make the movement may refuse to do so. In that event the courts are powerless to

compel performance. The service, when performed, is not a revenue movement, entered into for profit, but a matter of reciprocal service. The occupants of the car are limited to officers and employees, traveling upon business connected with the operation of their own railroad. They, by reason of their position, are provided with free passes, and no tickets are required. The purpose of the journey is to prepare the railroad of the owning company to perform its common carrier obligations and to facilitate an adequate transportation service. It needs but a moment's consideration to be convinced that the circumstances and conditions surrounding the two services are fundamentally dissimilar.

The undue preference and the prejudice condemned by Section 3 of the Act deal with the relative advantages and disadvantages of shippers, as between themselves. The terms employed by the statute imply that the prejudice exists against one shipper, which is a source of advantage to the other shipper alleged to be favored; and a competitive relation between the commodities in the case where discrimination is alleged is essential. This rule is consistently applied by the Commission in numerous decisions, some of which are as follows:

Miner v. *New York, N. H. & H. R. Co.*, 11 I. C. C. 422, 427;

Board of Trade v. *A., T. & S. F. R. Co.*, 29 I. C. C. 438, 443;

Calif. Walnut Growers Ass'n v. *A. & R. R. Co.*, 50 I. C. C. 558, 568;

Colgate & Co. v. *Tampa & J. Ry. Co.*, 144 I. C. C. 253, 257;

Sunderland Bros Co. v. *Chicago, B. & Q. R. Co.*, 148 I. C. C. 484, 486.

Manifestly, there can be no competition between a carrier desiring the movement of its office car over another line to aid and facilitate its own operations, on the one hand; and those desiring the transportation of a special, privately owned, or chartered car, for the exclusive use of ticket-holders traveling as passengers for hire, on their own business, or for their own pleasure, on the other. Competition is defined by the Commission, in *Transcontinental Rates*, 46 I. C. C. 236, as follows:

> Competition involves a striving between or among one or more persons or organizations for the same object.

How can it be said that a carrier desiring the movement of an office car to facilitate the operation of its road, is striving for the same object as those desiring the movement of a special, privately owned, or chartered car for their exclusive use? The object sought by the carrier is to better its railroad and improve its public service; and to accomplish that purpose it sends out an office car, occupied by its officers and employees. The movement of the car is a necessary step in facilitating the operation of the railroad. The occupants of the special, privately owned, or chartered car, on the other hand, are striving for quite a different object. They care nothing about improving or bettering the operation of the railroad in question, or any railroad. They are engaged exclusively in promoting their own business or pleasure. They may be a party of prospective purchasers being conducted to a distant point where lots or acreage property are offered for sale. They may consist of a man or woman of means, with family and friends, desiring the luxury of travel in their own exclusive car; or they may be any group traveling for business or for

pleasure. But, clearly, they are not in competition with a carrier sending out an office car for the purposes above stated.

We contend that there was no evidence to support the Commission's finding of unjust discrimination, or undue preference or prejudice, with respect to the movement of the office cars of another carrier. This being true, the Commission's order can not stand (*Chicago Junction Case*, 264 U. S. 258).

IV.

The Commission's order is clearly in excess of its power in so far as it undertakes to regulate movements of office cars in intrastate commerce.

The plaintiffs, as stated in their specification of errors, ask leave of the Court to amend their assignment and specification of errors by inserting an additional assignment or specification; or, in the alternative, they ask the Court to notice, as a plain error, the error so sought to be specified, as follows:

> 8. The lower court erred in not holding that the Commission's order, in so far as it purports to affect, control, or regulate strictly intrastate movements of office cars, is invalid because it is in violation of Sec. 1 (2) (a) of the Interstate Commerce Act, and also because it is in excess of the powers conferred on the Federal government by the commerce clause of the Constitution (Art. I, Sec. 8).

While the Commission's lack of power to embrace in its order intrastate commerce, as well as interstate commerce, was called to the attention of the lower court in our

reply brief, it was not specified as a ground of complaint in the petition. It was thought that so much of the Commission's order as purports to regulate intrastate commerce was void, even in the absence of a judicial declaration to that effect; but, in view of the severe penalties imposed by the Act for failure to comply with an order of the Commission and a general desire to avoid an apparent conflict with constituted authorities, we now wish to present this question, if we may properly do so, for the Court's determination.

The right of an appellant to amend its assignment of errors has been sustained in *O'Connell* v. *United States*, 253 U. S. 152; *Flickinger* v. *First National Bank*, 145 Fed. 162 (certiorari denied, 203 U. S. 595). Furthermore, the Court's power to notice a plain error is recognized in its rules (Rule 27, paragraph 4).

In Sec. 1 (2) of the Interstate Commerce Act, it is provided:

> The provisions of this Act . . . shall not apply—
>
> (a) To the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, wholly within one State and not shipped to or from a foreign country from or to any place in the United States as aforesaid.

The absolute want of power in Congress, and therefore in the Commission, to regulate the movements of office cars in intrastate commerce is apparent. This Court's ruling in *Howard* v. *Illinois Central R. Co.*, 207 U. S. 463, conclusively establishes, we respectfully submit, the invalidity of the Commission's order, in so far as it purports to extend to intrastate commerce.

V.

Both the Commission and Congress are deemed to have recognized the legality of the movement of office cars over foreign lines under free passes covering the transportation of the car, as well as the officers and employees occupying it.

Plaintiffs' contention may be briefly summarized as follows:

The practice of hauling the office cars of other lines without charge prevailed at the time of the passage of the Act to Regulate Commerce (R. 116). In the Hepburn Act of June 29, 1906, Congress made detailed provision for the issue of interstate passes. In 1907, the Commission issued certain regulations governing the forms of passes. The form for "car and party" passes is given, as follows (R. 32):

> Pass John Smith, car, and five officers and employees, Account President, officers, and employees X. Y. Z. Ry.

Thereafter, for 22 years, movements of office cars over foreign lines were made under car and party passes issued in accordance therewith. During this period, Congress, with full knowledge of the uniform and general practice of moving office cars over foreign lines under car and party passes, repeatedly amended the Interstate Commerce Act, and substantially reenacted a considerable portion of it. But in none of this legislation did Congress undertake to restrict or prohibit free movements of office cars over foreign lines or the issuance of car and party passes to cover such movements.

Plaintiffs contend that the action and non-action of Congress is equivalent to an adoption by it of the Commission's regulation above referred to, and that thereby the movement of office cars over foreign lines under car and party passes became sanctioned and legalized. This question, however, is presented in the companion case of *Louisville & Nashville R. Co. et al.* v. *United States*, and will not be argued here, since that would be an unnecessary duplication.

Respectfully submitted,

FRANK H. MOORE,
CYRUS CRANE,
Solicitors for Appellants.

SAMUEL W. MOORE,
Of Counsel.

December 22, 1930.

Exhibit "A".

ORDER

At a General Session of The Interstate Commerce Commission, Held at Its Office, in Washington, D. C., on the 4th Day of November, A. D. 1929

No. 17757

In the Matter of Use of Private Passenger Train Cars

It appearing, That, in compliance with the statute in such case made and provided, this commission, upon its own motion, entered into an investigation into and concerning certain questions arising under Sections 2, 3, 6 and 22 of the Interstate Commerce Act as to the transportation or movement of private passenger cars, including so-called office cars, of one carrier subject to the Act by another such carrier free or at other than published tariff rates, and relating to the enforcement of the foregoing provisions of the Act in that regard; and

It further appearing, That a full investigation of the matters and things involved was had, in the course of and pursuant to which a proposed report was submitted to the Commission, whereupon the carriers named in the list hereto attached appeared and by counsel excepted to said report, on which exceptions argument, oral and in writing, was had; and

It further appearing, That on the 21st day of June, 1929, this Commission after full consideration overruled said exceptions and made and filed a report containing its conclusions thereon, which report is hereby referred to and made a part hereof, and therein decided:

1. That the transportation or movement of private passenger cars, including so-called office cars, of one carrier subject to the Interstate Commerce Act by another such carrier free or at other than published tariff rates is contrary to the provisions of the Interstate Commerce Act;

2. That it is unjustly discriminatory and unduly preferential and prejudicial to haul such private cars of other carriers free, or at less than published tariff rates, while charging certain minimum fares and revenues for the movement of privately owned or chartered cars; and

3. That the transportation of persons in such private passenger cars, including berth and other accommodations, at the rate charged passengers provided only with ordinary coach accommodations is unjustly discriminatory and unduly preferential and prejudicial.

In its report the Commission declared that no order appeared to be necessary. On further and subsequent consideration, however, the Commission is of opinion that an order in the premises is proper and appropriate, and, the exceptants to the said proposed report having appeared before the Commission and expressly waived any further hearing in the premises,

It is ordered, That the carriers named in the list hereinbefore referred to and attached hereto, on behalf of which such exceptions were filed and argument heard and on whose behalf a waiver of further hearing has been expressly made, be, and each of them hereby is, notified and required to cease and desist, on or before January 15, 1930, and therefore to abstain, from the transportation or movement of private passenger train cars, including so-called office cars, of another carrier free or at other than published tariff rates.

And it is further ordered, That this order shall continue in force until the further order of the Commission.

By the Commission.

GEORGE B. MCGINTY,
Secretary.

Exhibit "B".

INTERSTATE COMMERCE COMMISSION, WASHINGTON.
In the Matter of Regulations to Govern the Forms and Recording of Passes, Issue of 1917.

At a Session of the Interstate Commerce Commission, Division 4, Held at Its Office, in Washington, D. C., on the 30th day of July, A. D. 1929.

The matter of issuing passes for private passenger train cars being under consideration;

It is ordered: That the Regulations to Govern the Forms and Recording of Passes, Issue of 1917, prescribed under an order of the Commission, entered on July 8, 1916, be and the same are, hereby amended by adding between lines 11 and 12 in paragraph 15 the following:

A car pass may be issued only for cars owned by the issuing carrier or held by it under lease for use in its business as a common carrier. It may not be issued for other cars. This provision is not to be construed as prohibiting the issuance of passes for cars of lines operated as a part of the same system. See In the Matter of the Use of Private Passenger Train Cars, 155 I. C. C. 775.

It is further ordered: That this order shall become effective on August 1, 1929.

By the Commission, Division 4.

GEORGE B. McGINTY,
Secretary.

EXHIBIT "C"

STANDARD FORM FOR DETOUR AGREEMENT

Adopted by The American Railway Association, October 25, 1905; with amendments adopted November 10, 1910, May 17, 1911, November 19, 1913, November 17, 1920, and May 15, 1924.

NOTE—This agreement should be executed on behalf of each company party thereto by an executive officer thereof and duly attested.

This Agreement, Executed in duplicate between.....

....., a corporation created and existing under the laws of.....

and .....

a corporation created and existing under the laws of

.....

WITNESSETH, THAT,

WHEREAS, should the railways of either party hereto become impassable by reason of unforseen occurrences, making detour movement desirable, each party hereto is willing whenever, in its judgment, the conditions warrant, and subject to the terms and conditions hereinafter set forth, to temporarily permit the trains of the other party, hereinafter referred to as the Foreign Company, to be run over its tracks (Home Company) as a service of accommodation and reciprocation.

NOW, THEREFORE, it is mutually agreed by and between the parties hereto as follows:

1. Whenever the Foreign Company desires to detour its trains it shall notify the Home Company, the circumstances necessitating detour movement, between what points, the number and character of trains and such other information as may be required by the Home Company. Upon receipt of such notice the Home Company shall promptly grant or refuse the accommodation requested. The granting of the accommodation will not warrant nor imply the insurance of the Foreign Company's trains against any of the risks of transportation, nor the assumption of liability therefor, by the Home Company. In the event of refusal to grant such permission, the Foreign Company shall have no claim of any nature against the Home Company by reason of such refusal.

2. The Foreign Company, if granted such permission, shall run its trains between the points designated over the tracks of the Home Company, using, unless otherwise agreed between the parties, its own engines, engine crews and train crews fully conversant with the Standard Code of the American Railway Association, but always with a pilot or pilots (not more than one pilot for each Foreign engine or train crew, nor more than two for any one train), to be furnished by the Home Company, and subject to all the rules and regulations of the Home Company, and the orders of its train dispatcher.

In case, by mutual agreement, the Home Company shall furnish engines and engine crews to haul, help or push trains of the Foreign Company, or in case, without mutual agreement, it becomes necessary, by reason of failure of the Foreign Company's engine to handle its train at speed required by the Home Company, or for other cause, for the Home Company to furnish engines and engine crews to haul, help or push trains of the Foreign Company, it may do so, and except at its option, without releasing pilot or pilots previously assigned to the train.

3. The Foreign Company, if granted such permission, shall promptly, upon presentation of bill, pay to the Home Company for trackage, the sum of One Dollar and Fifty Cents ($1.50) per train mile, or fraction thereof, with minimum trackage charge of Ten Dollars ($10.00) for each train detoured (no mileage to be included that is made under Items c, d and e, for which services specific charges are provided), and additional charges for all other services rendered by the Home Company at the rates specified below:

	When engine and engine crew are furnished	
	By Foreign Company Sec. 2, Par. 1	By Home Company Sec. 2, Par. 2

	By Foreign Company Sec. 2, Par. 1	By Home Company Sec. 2, Par. 2
(a) Per engine mile, including light mileage to and from point of service	None	$3.00
(b) Per engine tank for water furnished	$1.00	None
(c) Per engine turned on turntable or wye	$1.00	None
(d) Per car turned on turntable	$1.00	$1.00
(e) Per train turned on wye	$3.00	$3.00
(f) Fuel	Cost including any freight charges assessed by Foreign roads and charges over Home Road calculated at tariff rates to point of delivery plus 10% of total.	None
(g) Other engine supplies	Cost plus 10%	None
(h) Other train supplies	Cost plus 10%	Cost plus 10%
(i) Enginehouse expenses	Cost plus 10%	None
(j) Engine repairs	Cost plus 10%	None
(k) Pilots, including deadhead or light mileage to and from point of service, and furnished in accordance with Section 2, paragraphs 1 and 2	Cost plus 10%	Cost plus 10%
(l) Crews furnished to relieve Foreign train or engine crews, including deadhead or light mileage to and from point of service	Cost plus 10%	Cost plus 10%
(m) Bridge, ferry, terminal, trackage or switching charges assessed by other carriers in connection with handling detoured trains.	Contract or tariff rates	Contract or tariff rates

4. The Home Company shall not be held liable for or on account of any loss, damage, or delay, to the trains, engines, cars or other property of any kind of either company, nor to freight, baggage or other property of any kind carried in or upon such trains, engines or cars, nor for or on account of any injury to or death of passengers or employes of either company, or for or on account of any injury to the person or property of any other individual or individuals, company or companies, corporation or cor-

porations whatsoever, which may be incurred or sustained by reason of such trains being detoured, or by reason of such trains being delayed in such detouring, in whatever manner the same may be caused or occasioned, whether by or through the negligence of the Home Company, its agents or servants, or by reason of defects in tracks, structures, or facilities furnished by the Home Company, or otherwise, it being understood and agreed that all risks of such delays, loss, damage, injury and death shall be and is hereby assumed by the Foreign Company, and the Foreign Company shall and will hold harmless the Home Company from and against all liabilities or claims for all such delay, loss, damage, injury and death, and shall and will execute and deliver, or cause to be executed and delivered, to the Home Company, upon request, a full and complete release, satisfaction and discharge of all claims therefor, and will pay, or cause to be paid, all costs, and expenses incurred by either Company in the clearing of wrecks and repairs to equipment, track and property in which by reason of detour movements covered by this agreement the engines, trains or cars of the Foreign Company are concerned, expenses and attorney's fees incurred in defending any action which may be brought against the Home Company on account of any such claim or liability and any judgment which may be rendered against the Home Company on account thereof. The Foreign Company shall pay all fines, penalties, costs and expenses imposed upon or incurred by the Home Company by reason of any violation by the Foreign Company of the Safety Appliance or other State or Federal Laws, and hold the Home Company harmless therefrom.

5. In no case shall the Foreign Company do any local freight or passenger business whatever on the tracks of the Home Company without its consent.

All mileage and per diem accruing on cars in detoured trains shall be assumed by the Foreign Company and reported and paid by it direct to owners of cars.

6. (Special provisions.)

7. All differences soever which shall, consequent upon the detouring of trains, arise under this agreement, or otherwise, between the parties shall be submitted to the Committee on Operating Rules, Division I—Operating, as then constituted, of the American Railway Association on thirty (30) days' written notice to the other party. All proceedings before such Committee shall be had in accordance with such rules as it shall, from time to time, promulgate and the decision of such Committee shall be final and binding on and accepted as such and performed by all the parties.

8. All existing understandings and agreements between the parties hereto, or their predecessors, relating to matters included herein, are hereby abrogated and made void except that neither of the parties hereto shall be released from any liability which may have arisen under agreements and understandings in effect prior to the date of the execution of this agreement.

9. The covenants of this agreement shall be binding upon and inure in favor of the successors and assigns of the parties hereto, respectively, and the same shall be and remain in force from the date hereof until terminated by either party giving to the other ninety (90) days' notice in writing, fixing the date of such termination, and upon the date stated in such notice this agreement shall cease and determine.

In Witness Whereof, the parties hereto have executed this agreement in duplicate this.....

day of....., 19.....

.....

By.....

Its.....

.....

By.....

Its.....

STANDARD FORM FOR DETOUR AGREEMENT

BETWEEN

.....

AND

.....

DATED ..... 19.....